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CASE NO. 85-436

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

FLORIDA STATE UNIVERSITY, et al.,

Petitioners,

v.

DR. ANJALI A. JOSHI,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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BEST AVAILABLE COPY

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SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because Petitioner has presented questions to this Court that are not expressed in the terms and circumstances of the case below. Petitioner has taken one statement from the opinion below and has presented it out of context in its argument to this Court. The Petition should be denied because no legitimate conflict has or can be shown between the decision of the Eleventh Circuit and decisions of this Court or any other Circuit Court of Appeals.

ARGUMENT

The Petition for Writ of Certiorari should be denied by this Court because of its failure to

correctly state the law as set forth in the Joshi II decision [236 Joshi v. FSU Health Center, 673 F.2d 1227 (11th Cir. 1985)] relating to the burden of proof. Petitioner has clearly confused the burden of proof required for a plaintiff to prove discrimination with the burden that shifts to the employer once discrimination has been proven by the Plaintiff.

Petitioner maintains that conflict in the law has been created by the decision below in three different ways. Since all three of the specific areas of alleged conflict appear to arise out of this one statement,

> In order to prove that Joshi would not have been hired even in the absence

> of discrimination, defendants are required to show by a preponderance of the evidence (cite omitted) that all those to whom the position was offered, not merely those ultimately employed, were better qualified than Joshi (Joshi II at 1236).

from Joshi II, they will all be discussed together for purposes of this Response. The three "substantial ways" in which the Petitioner claims Joshi II conflicts with Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 267 (1981), are as follows:

1. Joshi II "requires the employer to prove non-discrimination";

2. Joshi II "requires the employer to prove it (non-

discrimination) by a preponderance of the evidence";

3. Joshi II "requires the employer to prove that those ultimately employed and all those to whom the position was offered were better qualified than Joshi." (Petitioner's Brief, Page 13.)

The first and second contentions made by Petitioner above are patently incorrect and misleading. The Joshi II decision quoted at length and followed the well-known burden of production for an employer, after Plaintiff proves a prima facie case, as established by the Supreme Court in Burdine. Petitioner cites this Court to no statement made by the Eleventh Circuit in the decision below which expressly or even

impliedly puts a greater burden on the employer than the standard set forth in Burdine.

The statement from Joshi II which Petitioner apparently relies upon to support its claim of conflict has nothing to do with the standard or burden for proving discrimination or non-discrimination. The statement Petitioner cites to this Court from Joshi II refers only to the burden required of an employer once discrimination has been proven. The lower Court is obviously discussing the burden of proof that shifts back to the employer once discrimination has been established by the Plaintiff and not the burden of proof required to prove discrimination. Since there is no conflict among the courts with

regard to the burden imposed on the employer once discrimination has been proven, the Petitioner erroneously implies to this Court that Joshi II is discussing the burden of proof required to prove discrimination in the first instance. An unbiased reading of the decision below makes it clear that the Court never required the employer to prove non-discrimination and obviously never required the employer to prove non-discrimination by a preponderance of the evidence.

The third point listed above which Petitioner claims conflicts with Burdine is also an erroneous interpretation of the law propounded by Joshi II since Petitioner has again taken it out of context. The

point is correct in that Joshi II allowed the employer to negate the presumption of back pay if it could show that those to whom the position was offered were better qualified than the Plaintiff. It is incorrect in that the employer implies that it was required to meet this burden as part of the initial proof of discrimination. Petitioner fails to recognize that the employer is only allowed or "required" this burden once discrimination has been proven and remedy becomes the issue. This clearly does not conflict with Burdine as claimed by Petitioners because it goes to a matter that was not even discussed in the Burdine opinion.

Petitioner erroneously assumes

that the Court below was requiring the employer to prove by a preponderance of the evidence that all those to whom the position was offered were better qualified than the Plaintiff in order to negate proof of discrimination. If the Eleventh Circuit had made such a finding, Respondent herein would have no alternative but to agree that this case was indeed in conflict with Burdine and appropriate for Supreme Court review. However, the Joshi II opinion is quite clear that the only additional burden of proof allowed to the employer-Petitioner was for the purpose of giving Petitioner the opportunity to rebut the presumption of entitlement to certain remedies such as back pay. Because Petitioner

failed in that burden as well as having failed to produce a legitimate and non-discriminatory reason for failing to hire Dr. Joshi, the Court of Appeals was well-justified in remanding for entry of judgment for the Plaintiff.

Petitioner also complains that the decision below conflicts with this Court's decisions regarding the proper application of Rule 52(a), Federal Rules of Civil Procedure. Petitioner is apparently referring to the finding that the trial court was clearly erroneous when it concluded that:

> The people at the University in charge of the hiring process did not in fact believe that she (plaintiff) was an applicant....

The Eleventh Circuit thoroughly discussed this entire factual situation and found:

> Not a single one of these persons [people at the university in charge of the hiring process] other than Dr. Rond testified that he did not consider Dr. Joshi an applicant after April 1. Even Dr. Rond's testimony is far from explicit.

Petitioner erroneously maintains in its brief that other witnesses, contrary to the finding of the Eleventh Circuit:

> In addition, Dr. Groomes, the Affirmative Action Officer at the University; R. Robinson, the University Personnel Director; and B. Butler, the Health Center Personnel Director, all testified they did not think the Plaintiff was an active applicant. (Petitioner's Brief, Page 25)

This is a false statement of what the record shows. Petitioner argued this to the Court below in its initial brief and in its Petition for Rehearing and Rehearing en banc. The Petitioner is misleading this Court by stating as facts matters which are not supported by the record or by any of the decisions below. After a complete review of the Record, the Eleventh Circuit found that only Dr. Rond's ambiguous testimony related to whether Dr. Joshi had been considered for the position.

Of greater importance, the facts that <u>are</u> in the record overwhelmingly support the finding that the named Defendants <u>did</u> know that Dr. Joshi was an applicant at the time of the vacancy. The Court sets forth some

of those facts, including an affidavit by the very Dr. Groomes whom Petitioner's claim knew nothing of Dr. Joshi's application at the time in question. Dr. Groomes' affidavit, partially cited in the opinion below, clearly contradicts all of Petitioner's unfounded and misleading assertions regarding whether appropriate University officials were aware of Dr. Joshi's status as a candidate.

Not only does the Petitioner claim that certain individuals testified they did not think that Plaintiff was an active applicant, but Petitioner also asserts that the District Court found their testimony plausible and credible. (Petitioner's Brief, Page 25-26). No such finding

was made by the Trial Court and Petitioner again fails to cite any support in the record or the opinions below for this erroneous statement.

In conclusion, Petitioner has confused (1) the burden that shifts to the Defendant to rebut the presumption of discrimination with (2) the burden that shifts to Defendant-employer once the Plaintiff has proven discrimination. This misinterpretation of the law discussed in the opinion below nullifies the basis for the questions presented to this Court. In other words, questions 1 and 2 which Petitioner presents to this Court are not based on a correct interpretation of the case below. With regard to question 3 covering the correct

application of Rule 52(a), there is no doubt but that the Eleventh Circuit has fully and thoroughly discussed the factual situation from the record below and was obviously left "with a definite and firm conviction that a mistake ha(d) been committed." United States v. United States Gypsum Company, 33 U.S. 364, 395, 92 L.Ed.746, 68 S.Ct. 525 (1948). The additional facts which Petitioner has attempted to supply to this Court to contradict the finding of the Court below are not supported by the Record and are not supplied to this Court by the Petitioner because they do not exist.

The Petition for Writ of Certiorari, having failed to point this Court to the alleged conflict

between the decision below and decisions of this Court or of any other Circuit Court of Appeals on the questions presented, should be denied.

CONCLUSION

Respondent respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit has been furnished by United States Mail to GENE T. SELLERS, State Board of Education, Knott Building, Tallahassee, Florida 32301, and GERALD B. JASKI, University Attorney, Florida State University, 311 Hecht House, Tallahassee, Florida 32306, Attorneys for Petitioners, this 11th day of October, 1985.

LINDSEY GORMAN